



IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No.

76-1754

SERGEANT LONNIE KISHPAUGH, *et al.*,
Petitioner,

v.

DISTRICT OF COLUMBIA GOVERNMENT, *et al.*,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO
THE DISTRICT OF COLUMBIA COURT OF APPEALS**

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TABLE OF CONTENTS

	<u>Page</u>
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
REASONS WHY THE WRIT SHOULD BE GRANTED	5
CONCLUSION	6
APPENDIX	1a

AUTHORITIES CITED

Cases:

<i>Matala v. Washington</i> , 276 A.2d 127 (1971)	5
--	---

Statutes:

Amendment 1, United States Constitution	3
Amendment 5, United States Constitution	3
Title 1, Section 1502, District of Columbia Code	3, 6
Title 4, Section 122, District of Columbia Code	3, 5

(ii)

	<u>Page</u>
Title 11, Section 921, District of Columbia Code	3
Title 28, United States Code, Section 1257, as amended to July 29, 1970, Public Law 91-358, Title 1, Section 172(a)(1), 84 Stat. 590	2

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**PETITION FOR A WRIT OF CERTIORARI TO
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Petitioner, Sergeant Lonnie Kishapugh, respectfully prays that a writ of certiorari issue to review the order, District of Columbia Court of Appeals, filed in this proceeding on February 2, 1977, and orders denying petitioner's request for reconsideration and hearing en banc. (See Appendix pp. 1a-6a, filed on March 8, 1977).

OPINION BELOW

The D.C. Court of Appeals, by order dated February 2, 1977, dismissed petitioner's appeal and, by orders dated March 8, 1977, Appendix 5a-6a, denied petitioner's petition for reconsideration and hearing en banc (Appendix 2a). The trial court ruled that insurmountable hurdles divest this court of jurisdiction over review of those matters, trial board proceedings being subject to the provisions of the District of Columbia's Administrative Procedures Act and, as a consequence, only reviewable by the D.C. Court of Appeals. [Page 4, lines 11-17, Official Transcript of Proceedings, Superior Court.]

JURISDICTION

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1257, as amended to July 29, 1970, Public Law 91-358, Title 1, Section 172(a), 84 Stat. 590. The ORDER of the Appellate Court was entered on February 2, 1977 (see Appendix p. 1a, and a petition for reconsideration and hearing en banc was timely filed and denied on March 8, 1977 (see Appendix pp. 5a-6a):

"On consideration of appellant's petition for hearing *en banc*, it is

ORDERED that appellant's petition is denied."

QUESTION PRESENTED

Can a police officer who alleges arbitrary and capricious conduct of trial board proceedings, the unconstitutionality of statutes and regulations, denial of freedom of speech, denial of due process and denial of equal treatment of law, be denied access to judicial review?

STATUTES INVOLVED

Amendment 1, United States Constitution

Congress shall make no law . . . abridging the freedom of speech.

Amendment 5, United States Constitution

No person shall . . . be deprived of life, liberty or property, without due process of law.

Title 1, Section 1502, District of Columbia Code (1973 ed.)

(8) Contested case means a proceeding before the commissioner . . . but shall not include (B) the selection or tenure of an officer or employee of the District.

Title 4, Section 122, District of Columbia Code (1973 ed.)

. . . the findings of such trial board or boards shall be final and conclusive unless appeal in writing therefrom is made within five days to the commissioner of the District of Columbia. . .

Title 11, Section 921, District of Columbia Code (1973 ed.)

(a) . . . the Superior Court had jurisdiction of any civil action or other matter (at law or in equity) brought in the District of Columbia.

STATEMENT OF THE CASE

Petitioner, a sergeant of the Metropolitan Police Department, Washington, D.C., was sued, along with his lawyer, in Small Claims Court in the amount of \$500.00 for a

witness fee. The petitioner had been convicted of using an offensive word by a Metropolitan Police Trial Board in which the witness Goldie Johnson had testified. Petitioner was fined \$500.00, his conviction made a permanent part of his personnel record and his promotion deferred; the conviction was affirmed by the mayor on January 20, 1976.

At the trial board proceedings, the witness Goldie Johnson refused to answer certain questions and took the 5th Amendment on others. Hearsay evidence was admitted and petitioner was not permitted to examine certain witnesses. Petitioner stated the proceedings were in violation of his right to freedom of speech, and challenged the constitutionality of the police regulation and the trial board proceeding.

The inspector who signed the charges and recommendation for trial board action against the sergeant refused to appear at the hearing and the official appointed by this inspector to conduct the investigation on behalf of the police department testified and recommended against the trial board taking any action against the petitioner. The official sitting as judges on the trial board ruled that the trial board was not concerned with the legality of the proceedings. [Transcript of trial board proceedings, May 20, 21, 1975.]

In Court, Petitioner denied owing the \$500.00 witness fee and stated that if it was owed, it was owed by the three trial board officials and the District of Columbia Government. The court made the members of the trial board and the District of Columbia Government parties to the action. Petitioner filed an answer, affirmative defense and counterclaim and asked for a jury trial. Petitioner stated the witness was acting at the instigation of

the Police Trial Board officials and the District of Columbia Government when she filed the small claims complaint. Petitioner alleged that the witness initiated the action that brought the petitioner before the Police Trial Board. Petitioner stated that the small claims complaint was filed in derogation of judicial process, the charge, prosecution, and conviction by the trial board was done under color of law, violated his 1st Amendment right of freedom of speech, violated petitioner's civil rights and was done in violation of Constitutional due process. Petitioner asks the court to vacate the findings of the trial board and dismiss the charge or in the alternative, set aside its finding and present its official investigation and recommendations to a different trial board.

The Superior Court ruled that it did not have jurisdiction and that the matter belonged before the District of Columbia Court of Appeals and dismissed it. The District of Columbia Court of Appeals also dismissed it.

REASONS WHY THE WRIT SHOULD BE GRANTED

The District of Columbia Code (1973 ed.), Title 4, Section 122, confers final jurisdiction to the Police Trial Board with a final appeal to the mayor. This statute was extended by the D.C. Court of Appeals in *Matala v. Washington*, 276 A.2d 127 (1971), in which the appellate court denied review in cases where the selection or tenure of a District of Columbia employee is involved. Petitioner contends that District of Columbia Code, Title 11, Section 921, established the statutory right to judicial review in the Superior Court for the District of Columbia employee. However, that court ruled that jurisdiction was not in the Superior Court, but in the D.C. Court of Appeals. In *Matala, supra*, the D.C. Court of Appeals has ruled that it does not

INDEX TO APPENDIX

have jurisdiction in the matter, holding that the District of Columbia Code (1973 ed.), Title 1, Section 1502, 8(B), excludes "selection and tenure of employment" from the meaning of a contested case. The question therefore, is, where does judicial review lie for those District of Columbia employees who have been disciplined or terminated from their employment through a police trial board or other agency proceeding? Petitioner contends that provision 8(b) of Section 1502, Title 1 of the District of Columbia Code (1973 ed.) is rendered unconstitutional because it denies judicial review and due process of law to the approximately 45,000 District of Columbia employees of which petitioner is one, and judicial review is not afforded those employees in the Superior Court, as obliged by Title 11, Section 921, District of Columbia Code (1973 ed.), where Congress has reserved the examination, subpoena and enforcement power of municipal matters to supervision and control by the Superior Court.*

CONCLUSION

For the reasons herein, the Petitioner asks that the Petition for a Writ of Certiorari to the District of Columbia Court of Appeals be granted.

Respectfully submitted,

WILLIAM G. BURLESON

1000 Pennsylvania Ave., S.E.
Washington, D.C. 20003

Attorney for Petitioner

*Title 1, Sec. 237; Title 4, Secs. 601, 603, D.C. Code, 1973 ed., as amended.

	<u>Page</u>
Order dated February 2, 1977, dismissing Petitioner's Appeal	1a
Petitioner's Petition for Reconsideration and Hearing En Banc, dated February 16, 1971	2a
Order dated March 8, 1977, denying Petition for Reconsideration	5a
Order dated March 8, 1977, denying Petition for Hearing <i>En Banc</i>	6a

[Filed February 2, 1977]

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 10828)	Alexander L. Stevas
LONNIE KISHPAUGH, ET AL.,)	Clerk
Appellants,)	JANUARY TERM, 1977
v.)	CA 8735-75
)	
GOLDIE C. JOHNSON, ET AL.,)	
Appellees.)	

ORDER

On consideration of the motion of appellees' to dismiss this appeal and of appellants' opposition thereto, it is

ORDERED that appellees' motion be granted and this appeal is hereby dismissed.

PER CURIAM:

COPIES TO:

Honorable Theodore R. Newman, Jr.
Chief Judge, District of Columbia Court of Appeals

Clerk, Superior Court of the District of Columbia

Michael C. McGoings, Esquire
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(Attorney for Appellants)

Richard W. Barton, Esquire
Assistant Corporation Counsel
(Attorney for Appellees)

[Dated February 16, 1977]

* * *

DISTRICT OF COLUMBIA COURT OF APPEALS

* * *

PETITION FOR RECONSIDERATION AND HEARING EN BANC

WAS THE APPELLANT DENIED DUE PROCESS OF LAW WHEN THE SUPERIOR COURT RULED, CONTRARY TO DISTRICT OF COLUMBIA LAW, THAT IT LACKED JURISDICTION TO REVIEW PROCEEDINGS OF THE DISTRICT OF COLUMBIA METROPOLITAN POLICE TRIAL BOARD, AND WHEN THE DISTRICT OF COLUMBIA COURT OF APPEALS UPHELD THE LOWER COURT, BUT RULED THAT IT, TOO, LACKED JURISDICTION TO REVIEW DISTRICT OF COLUMBIA METROPOLITAN POLICE TRIAL BOARD PROCEEDINGS?

The dismissal by the District of Columbia Court of Appeals of Appellant Kishpaugh's appeal to the District of Columbia Superior Court from the findings of the District of Columbia Metropolitan Police Trial Board was contrary to existing statutory law and case law. Yet this Court, in ordering the dismissal of Appellant's appeal has taken such action without comment.

In a disciplinary action before the District of Columbia Metropolitan Police Trial Board, Appellant Kishpaugh was fined \$750.00. He appealed this finding to the District of Columbia Superior Court under the provisions of the District of Columbia Code, Title II, Section 921, which confers civil jurisdiction upon the District of Columbia Superior Court. The Superior Court incorrectly found that proceedings before the District of Columbia Metropolitan Police Trial Board in which the decision of the

Trial Board results in a fine and other disciplinary action short of termination of employment was only reviewable by the District of Columbia Court of Appeals. However, as it was pointed out to this Court in Appellant's brief, under the provisions of the District of Columbia Administrative Procedure Act, (D.C. Code, Sections 1 - 1501 to 1 - 1510, 1973 ed.), the D.C. Court of Appeals may review decisions of an agency only in a contested case, (D.C. Code, Section 1 - 1510). Any matter involving the "selection or tenure of an officer or employee of the District" is specifically excluded from the definition of the term "contested case," (D.C. Code Section 1 - 1502(8)(B)), furthermore, it has been held that Police Trial Board proceedings resulting in less than suspension or dismissal from the force involves tenure and cannot be directly applied to the District of Columbia Court of Appeals, *Matala v. Washington*, 276 A2d, 127 (1971). In *Matala*, as in the present case, the police officer was charged with conduct unbecoming an officer and was fined.

The dismissal of Appellant Kishpaugh's appeal by this Court has several results. First, Appellant's statutory right to judicial review by the District of Columbia Superior Court has been declared non-existent, without expressly declaring the statutory provisions granting such jurisdiction to the Superior Court to be void and without any comment by this Court that the lower court's interpretation was correct. In so doing, this Court has foreclosed the Appellant from seeking judicial review. To deny to Appellant judicial review is to deny the Appellant due process of law. Secondly, the decision of the Superior Court overrules this Court's decision in *Matala*. Yet the Superior Court never gave any recognition to the *Matala* decision. Thirdly, the combined decisions of the Superior Court and this Court's granting of Appellee's Motion

to Dismiss because of lack of jurisdiction have resulted in two obvious contradictions. The Superior Court has held that the Court of Appeals has jurisdiction and the Court of Appeals has held that it does not. Only this Court can now clarify this issue.

Respectfully submitted,

MICHAEL C. McGOINGS #193-185
Attorney for Appellants and
Third-Party Plaintiffs

[Certificate of Service]

* * *

[Filed March 8, 1977]

DISTRICT OF COLUMBIA COURT OF APPEALS

* * *

ORDER

On consideration of appellant's petition for reconsideration, it is

ORDERED that appellants' petition be denied.

PER CURIAM:

COPIES TO:

Honorable Theodore R. Newman, Jr.
Chief Judge, District of Columbia Court of Appeals

Clerk, Superior Court of the District of Columbia

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[Filed March 8, 1977]

DISTRICT OF COLUMBIA COURT OF APPEALS

* * *

ORDER

On consideration of appellants' petition for hearing *en banc*, it is

ORDERED that appellants' petition is denied.

PER CURIAM:

Chief Judge Newman did not participate in the foregoing order.

COPIES TO:

Honorable Theodore R. Newman, Jr.
Chief Judge, District of Columbia Court of Appeals
Clerk, Superior Court of the District of Columbia

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